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No. 88-334

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN S. LYTLE,

Petitioner,

v.

SCHWITZER U.S., INC., a subsidiary of SCHWITZER, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
GAREN E. DODGE *
McGUINESS & WILLIAMS
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600

Attorneys for Amicus Curiae, Equal Employment Advisory Council

* Counsel of Record

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The Equal Employment Advisory Council, with the written consent of the parties, respectfully submits this brief as amicus curiae in support of the Respondent. The letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council (EEAC or Council) is a voluntary nonprofit association organized to promote sound government policies pertaining to employment discrimination. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a board of directors composed of experts in equal employment opportunity. Their combined experience gives the Council a unique depth

of understanding of the practical, as well as legal aspects of equal employment policies and requirements. The members of the Council are committed to the principles of nondiscrimination and equal employment opportunity.

As employers, the Council's members are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. (Title VII), as well as the Civil Rights Act of 1866, 42 U.S.C. § 1981 (Section 1981). As such, they have a direct interest in the issue presented for this Court's consideration: that is, whether a plaintiff is entitled to a jury trial under Section 1981 when a district court has properly found that the plaintiff failed to establish the *prima facie* elements of a cause of action under Title VII after a full presentation of evidence at a bench trial, but when a Court of Appeals later determines that the district court had improperly dismissed a Section 1981 claim involving the same facts and legal theories. In addition, EEAC's members have an interest in a related basis on which this Court could properly dispose of this case without even reaching the jury trial issue—that is, that Section 1981 does not cover race discrimination involving discharge or retaliation, Lytle's complaints herein, particularly after this Court's decision last term in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

Because of its interest in issues involving Section 1981, EEAC filed briefs with this Court in the *Patterson* case, both as initially argued and again upon reconsideration of *Runyon v. McCrary*, 427 U.S. 160 (1976). The Council also addressed Section 1981 issues in *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987) (personal injury, not contract, statute of limitations applies in a Section 1981 case), *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (Section 1981 covers claims of ancestry and ethnicity discrimination, as well as that of race), and *General Building Contractors Ass'n. Inc. v. Pennsylvania*, 458 U.S. 375 (1982) (standard of proof under Section 1981 is one of intentional discrimination).

Indeed, because of EEAC's concern related to the proof of employment discrimination cases generally, the Council has filed briefs amicus curiae in this Court in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989); *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777 (1988); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), among others. EEAC also addressed the issue of jury trials under Title VII, *Beesley v. Hartford Fire Insurance Co.*, CA No. 89-AR-1062-S (N.D. Alabama) (decision pending), and the Age Discrimination in Employment Act, *Lorillard v. Pons*, 413 U.S. 575 (1978). Accordingly, because of its past experience with these issues, the Council is well qualified to brief the Court in this case.

STATEMENT OF THE CASE

Schwitzer dismissed John Lytle from his position as machinist on August 15, 1983, for excessive, unexcused absences. Lytle had asked his supervisor for permission to take a Friday off to visit his doctor, which his supervisor granted on condition that Lytle work on the following Saturday. Lytle not only took Friday off, but left work without authorization nearly two hours early on Thursday, and then failed to report for eight hours of work on Saturday. Because company policy does not permit more than eight hours of unexcused absences per year, Lytle was discharged.

After his discharge, Lytle began applying for jobs with other companies. In accord with established policy, Schwitzer provided Lytle's dates of employment and his job title to two prospective employers who asked for a reference. The company provided no negative information about Lytle, and both companies hired him.

Lytle, who is black, filed suit in federal district court under both Title VII and Section 1981, alleging that he

had been discharged because of his race, and that the company had retaliated against him for filing his discrimination charge when it failed to provide more favorable letters of reference. He relied on evidence that the company had once provided a favorable reference letter for a white worker. Lytle based his Title VII and Section 1981 allegations upon identical facts.

The U.S. District Court for the Western District of North Carolina, in an unreported decision, dismissed the Section 1981 claims prior to trial, holding that, in the absence of an independent factual basis for the Section 1981 suit, Title VII was Lytle's exclusive federal remedy. At the close of Lytle's presentation of evidence at a Title VII bench trial, the court dismissed the allegations of discriminatory discharge. The court held that the evidence was not sufficient to establish a *prima facie* case since Lytle failed to show that any white employees received less severe discipline for unexcused absences. The district court then entered a verdict for Schwitzer on the retaliation claim, finding that the granting of one "favorable" letter of reference to a white employee was done through "inadvertence." Joint Appendix (J.A.) at 63.

The Fourth Circuit held 2-1 that although Title VII provided an avenue of relief, the district court had erroneously dismissed the claims under Section 1981, which provided an independent source of relief on the same claim. But the appellate court also declined to order a "second" trial—this one by jury under Section 1981—reasoning that the district court's Title VII findings were entitled to collateral estoppel effect as to legal theories arising out of the same facts, as the same standards apply under both statutes. The Fourth Circuit then affirmed the district court's findings that Lytle had failed to establish a *prima facie* case of discriminatory discharge and retaliation. Judge Widener dissented, reasoning that Lytle had been denied his right to a jury trial under the Seventh Amendment to the U.S. Constitution.

SUMMARY OF ARGUMENT

The elements of a Section 1981 employment discrimination claim are identical to the elements of a Title VII disparate treatment claim. Therefore, where a trial court correctly concludes, after a bench trial on the merits, that a plaintiff has failed to establish a *prima facie* case under Title VII, it is entirely appropriate to deny a plaintiff the so-called "right" to relitigate those same facts and legal theories before a jury under Section 1981. This Court, in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), indicated that a litigant is not always entitled to have a jury determine issues that have been adjudicated by a trial judge, and the Fourth Circuit below properly applied that doctrine to the instant case. Indeed, as the Fourth Circuit noted in *Ritter v. Mount Saint Mary's College*, 814 F.2d 896, 992, *cert. denied*, 484 U.S. 913 (1987), where the plaintiff has had a full and fair opportunity to litigate his claims, "one trial of common facts is enough."

Despite Petitioner's arguments to the contrary, a court's refusal to sanction a needless relitigation of the same facts under Section 1981 does not run afoul of the Seventh Amendment's right to a jury trial. As indicated by this Court in *Katchen v. Landy*, 382 U.S. 323 (1966), there are situations in which courts may dispose of equitable claims in a bench trial even though "the results might be dispositive of the issues involved in the legal claim." Thus, the Seventh Amendment is not to be applied "in a rigid manner"; where the judge has already assessed the relevant facts, there simply "is no further factfinding function for the jury to perform." *Parklane Hosiery*, 439 U.S. at 336.

Indeed, strong policy reasons support the denial of a "second" trial of common facts by a jury. For example, a plaintiff will always be able to present his evidence at the bench trial. And although the issues are not presented before a jury, all parties have had a full opportunity to litigate before an independent trier of fact.

No other persons, except those parties, are affected by the trial court's dismissal. Giving preclusive effect to the bench trial decision against those parties also promotes judicial economy by preventing needless litigation and at most results in "error" that is "harmless" to the litigant who lost—particularly where, as here, there is insufficient evidence of a *prima facie* case—because the judge would have taken the case from the jury and granted a directed verdict in any event. Given the foregoing, the decision below promotes much needed "finality" in the judicial process. This Court should adopt the rule that, at minimum, a district court may deny relitigation by a jury whenever evidence produced at the bench trial indicates that the plaintiff has failed to establish an element of his *prima facie* case, such that he would not be able to survive a motion for directed verdict.

EEAC would also stress that this Court need not even *reach* the jury issue since, under its decision last term in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989), it is now apparent that claims of discharge and retaliation are not actionable under Section 1981. Rather, that law only covers the "making" and "enforcing" of a contract. *Patterson* strongly implies, and its reasoned progeny clearly hold, that discharges and instances of retaliation are neither.

Sound public policy supports this construction, in that Title VII's well-crafted conciliation and resolution procedures would be undermined by an overbroad reading of Section 1981. Moreover, it makes no sense to twist the meaning of Section 1981 to reach discharge and retaliation claims, since Title VII already covers such claims and is currently being interpreted and enforced in a manner that protects the rights of charging parties—a manner that is consistent with our national antidiscrimination laws and policies. As a result, this Court would be warranted in dismissing the petition for a writ of certiorari as improvidently granted since the issues are now moot.

ARGUMENT

I. WHERE A COURT HAS CORRECTLY FOUND THAT A PLAINTIFF FAILED TO ESTABLISH A PRIMA FACIE CASE UNDER TITLE VII, THE PLAINTIFF IS NOT ENTITLED TO A JURY TRIAL UNDER SECTION 1981 INVOLVING THE SAME FACTS AND LEGAL THEORIES

A. Because The Elements Of A Section 1981 Claim Are Identical To A Title VII Claim Alleging Intentional Race Discrimination, A Court May Properly Rule That "One Trial Of Common Facts Is Enough," And Thereby Deny Relitigation Of The Dismissed Title VII Claim By A Jury Under Section 1981

As the Fourth Circuit below properly noted, "it is beyond peradventure that the elements of a *prima facie* case of employment discrimination alleging disparate treatment under Title VII and § 1981 are identical." Slip Op. at 7, citing *Gairola v. Commonwealth of Virginia Department of General Services*, 753 F.2d 1281, 1285 (4th Cir. 1985), and the cases cited therein. *See Patterson v. McLean Credit Union*, 109 S. Ct. at 2378 (J. Kennedy) and 109 S.Ct. at 2390 (J. Brennan, concurring in part).[1]

The court below found that Lytle failed to establish a *prima facie* case of discrimination under Title VII, both for his discharge and his retaliation claims.[2] Specifically—as discussed more fully in Respondent's brief, and as

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[1] Other circuits agree. *See Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *Jackson v. RKO Bottlers*, 743 F.2d 370, 378 (6th Cir. 1984).

[2] This Court, in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), set out the elements necessary to make out a *prima facie* case of disparate treatment under both statutes. As modified by the Fourth Circuit in *Moore v. City of Charlotte*, 754 F.2d 1100 (4th Cir.), *cert. denied*, 472 U.S. 1021 (1985), to address discriminatory discipline cases involving race, a plaintiff must establish these elements: (1) that he is black; (2) that he was discharged for violation of a company rule; (3) that he engaged in prohibited conduct similar to that of a person of another race; and (4) that disciplinary measures enforced against him were more severe than those enforced against the other person.

properly noted by the district and appellate courts below —Lytle left work early on Thursday, and did not report or call in on either Friday or Saturday. This behavior amounted to the unexcused use of over eight hours of leave which, under Schwitzer's policies, is a dischargeable offense. Fatal to his case, Lytle could not identify a single, non-black employee guilty of a similar violation who was treated any differently. He thus failed to establish an essential element of his discharge case. J.A. at 60.[8]

Because the elements of a Section 1981 and a Title VII disparate treatment claim are identical, the Fourth Circuit below correctly determined that "[W]here the elements of two causes of action are the same, the findings by the court in one preclude the trial of the other, and we so hold." Slip op. at 8. *See Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) ("The facts here that preclude relief under Title VII also precludes a Section 1981 claim").

To deny relitigation of the same facts and legal issues by a jury is fully supported by the decisions of this and other courts. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), this Court ruled that a litigant is not always entitled to have a jury determine issues that had been adjudicated previously by a trial judge. It adopted the view that relitigation of identical issues runs afoul of the interests of judicial economy, and does not violate the Seventh Amendment's guarantee of a right to a jury. This Court concluded that where a judge has determined facts to be adverse, "there is no further fact-finding function for the jury to perform, since the common factual issues" have been decided. *Id.* at 336. *See also Galloway v. United States*, 319 U.S. 372 (1943).

[8] Similarly, with regard to his retaliation claim, Lytle failed to establish that Schwitzer took adverse action against him, or that a causal connection existed between his filing of an EEOC charge and any adverse action—necessary elements in a retaliation claim. *See Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984). As noted by the district court below, while Schwitzer provided one favorable reference to a white worker, it was done through inadvertence, and the Fourth Circuit declined to find that the district court's decision was clearly erroneous. J.A. at 63.

Similarly, in *Ritter v. Mount St. Mary's College*, 814 F.2d 986, the Fourth Circuit ruled that a trial court's Title VII findings prevent the relitigation of those findings before a jury under a legal theory involving the same facts. In *Ritter*, a professor sued her college under Title VII, the Equal Pay Act (EPA), 29 U.S.C. § 206(d), and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* After a bench trial, the district court correctly ruled that, under Title VII, she was not qualified for tenure, but erred in dismissing her claims under the EPA and ADEA. The Fourth Circuit applied *Parklane Hosiery* to deny relitigation of the EPA and ADEA claims before a jury, ruling that "[o]ne trial of common facts is enough." *Ritter*, 814 F.2d at 991. Likewise, the Fourth Circuit below correctly determined that Lytle was not entitled to relitigate his Section 1981 claim.

As we now show, a court may deny needless relitigation under such circumstances and not violate the Seventh Amendment.

B. A Court's Refusal To Permit A Needless Relitigation Of Common Facts Under Section 1981 Does Not Violate The Seventh Amendment's Guarantee Of A Jury Trial In Suits At Common Law

Petitioners argue that the Fourth Circuit's ruling erroneously deprived Lytle of his "right to a jury trial," in violation of the Seventh Amendment to the U.S. Constitution. Pet. Br. at 25. Petitioners call this right an "entitlement," the denial of which is subject to "reversal *per se*." *Id.* at 41. It is clear, however, that the Seventh Amendment is not so broad. It simply provides that "In suits at common law . . . the right to trial by jury shall be preserved. . . ." As explained fully by this Court in *Parklane Hosiery Co.*, 439 U.S. at 336, "[t]he Seventh Amendment has never been interpreted in [a] rigid manner," and "many procedural devices developed since 1791

. . . have diminished the civil jury's historic domain." For example, this Court has held that neither the doctrines of directed verdict nor summary judgment violate the Seventh Amendment. *See Galloway*, 319 U.S. at 388-93, and *Fidelity & Deposit Co. of Md. v. United States*, 187 U.S. 315, 319-21 (1902).

Of more direct relevance to the case herein, in *Katchen v. Landy*, 382 U.S. 323 (1966), this Court held that a bankruptcy court, sitting as a statutory court of equity, is empowered to decide equitable claims before deciding legal claims—even though the factual issues could just as well have been decided by a jury under the Seventh Amendment if the legal claims had been adjudicated first. *See Parklane Hosiery*, 439 U.S. at 334-35. Indeed, this Court in *Katchen* stated that "there might be situations in which the Court could proceed to resolve the equitable claim first even though the results might be dispositive of the issues involved in the legal claim." 382 U.S. at 339-40. Such a situation was presented to the trial judge below. He resolved the Title VII claims at the bench trial after dismissing the Section 1981 claims. That he may have erred in dismissing the Section 1981 claims does not convert his Title VII findings into a violation of the Seventh Amendment. As this Court stated in *Parklane Hosiery*, there simply is "no further factfinding function for the jury to perform," 439 U.S. at 336.

Contrary to Petitioner's assertions, such a ruling will not diminish the effect of this Court's decision in *Beacon Theatres, Inc. v. Westover* 359 U.S. 500 (1959), or *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). Both cases stand for the proposition that, whenever possible, the right to a jury trial should be ensured in a claim containing both legal and equitable claims in the same set of facts, thus "precluding the prior determination of the factual issues by a court sitting in equity." *Ritter*, 814 F.2d at 990. But, as this Court made eminently clear in *Katchen*, 382 U.S. at 339, "[i]n neither *Beacon Theatres* nor *Dairy Queen* was there involved a specific statutory scheme con-

templating the prompt trial of a disputed claim without the intervention of a jury."

Here, in stark contrast, a specific statutory scheme—Title VII—contemplates a prompt trial of the same facts and legal theories without the intervention of a jury.[4] Indeed, this Court in *Parklane Hosiery*, 439 U.S. at 334-35, explained that the premise of *Beacon Theatres* is "no more than a general prudential rule" that has since been interpreted by *Katchen* to permit a court sitting in equity to adjudicate equitable claims prior to legal claims "even though the factual issues decided in the equity action would have been triable by a jury under the Seventh Amendment if the legal claims had been adjudicated first." [5]

Petitioner contends that *Parklane Hosiery* is inapposite because it presented only the issue of whether an adverse equitable adjudication in one lawsuit collaterally estops the relitigation of the same issues before a jury in a *subsequent* legal action. Pet. Br. at 46. *See, e.g. Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348 (7th Cir. 1987). But it is clear that this Court did not intend its rulings to have such limited effect. As the Fourth Circuit in *Ritter* stated, it is irrelevant that *Parklane Hosiery* involved a "separate suit." The error is the same: a court resolves issues that could have been resolved by a jury. *Ritter* explained:

> *It would be absurd to say that the requirement of a "prior suit" means that the facts found in a single case cannot bind the parties in that same case.* In-

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[4] Petitioners call this doctrine the "narrow *Katchen* exception," applicable to the "specialized bankruptcy scheme." Pet. Br. at 50, n.29. Clearly this Court in *Katchen* and *Parklane Hosiery* intended the doctrine to have wider applicability than is suggested by Petitioners.

[5] This Court's recent decisions in *Granfinanciera S.A. v. Nordberg*, 109 S.Ct. 2782 (1989), and *Tull v. United States*, 481 U.S. 412 (1987) are not to the contrary. Those cases merely reiterated this Court's application of the "legal-equitable" distinction in determing whether a right to jury trial exists.

deed, if the parties were not bound by the facts found in the very same case which they were litigating, then the judgments of courts issued during trial would become irrelevancies.

814 F.2d at 992 (emphasis supplied). *Ritter* properly denied relitigation, and so should this Court.

Indeed, as we now show, the policy rationales supporting the rule in *Parklane Hosiery*, *Katchen*, and *Ritter* apply with full force to the case presented herein.

C. Strong Policy Reasons Support A Court's Denial Of A Second Trial Of Common Facts, Particularly Where The Court Determines That The Plaintiff Has Failed To Establish Even A Prima Facie Case

The Fourth Circuit below recognized a number of policy concerns that support a court's denial of a "second" trial under Section 1981 where the court determines that the facts common to both Section 1981 and Title VII fail to support a case of discrimination. These policy concerns apply regardless of whether an appeals court later determines that the trial court erred in dismissing the Section 1981 claim.

The first such policy consideration is that the party seeking a second trial always will have had a full opportunity to present his evidence at the bench trial, as Lytle did here. No one is suggesting that plaintiffs be denied the ability fully and fairly to present evidence of discrimination. Indeed, Lytle attempted but failed in his showing: he could not even prove a *prima facie* case that a white person was treated any differently than Lytle for excessive, unexcused absences, or that the company gave a favorable letter of recommendation through anything other than inadvertence. In this connection, the Fourth Circuit has properly recognized that the bench trial results would be given preclusive affect only as against parties to the lawsuit. No one who was "not a party to the former suit, or did not have their interests substantially protected therein" will be touched. *Ritter*, 814 F.2d at 992.

Moreover, as properly recognized by this and other courts, a court's refusal to sanction a second trial can have the "dual purpose of protecting litigants from relitigating an identical issue. . . and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery*, 439 U.S. at 326. Indeed, in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-329 (1971), this Court noted that where a defendant is forced to present a complete defense on the merits in a claim that the plaintiff has litigated and lost, there is an arguable "misallocation of resources," reflecting either the "aura of the gaming table or a 'lack of discipline and of disinterestedness on the part of the lower courts.'" *Id.* at 329, citing *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180 (1952).[6]

Moreover, a litigant such as Lytle would experience no "harm" under the decision below, other than the inability to present the same facts to a jury. But, as this Court has determined in *Parklane* and other cases, the harm in denying a jury trial is insufficient to override the other policy concerns, such as a speedy resolution of disputes. *See Ritter*, 814 F.2d at 991. Even where the trial judge commits error in dismissing the Section 1981 claim, such error is harmless," particularly where, as here, the plaintiff's evidence was insufficient and the employer could have obtained a directed verdict anyway. *See Keller v. Price George's County*, 827 F.2d 952, 954-55 (4th Cir. 1987); *Dwyer v. Smith*, 867 F.2d 184 (4th Cir. 1989). Certainly, Fed. R. Civ. P. 61, the rule permitting "harmless error," would not require a new trial.

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[6] In *Ritter*, the Fourth Circuit noted that "*Parklane* decided that the judicial interest in the economical resolution of cases . . . does override the interest of the plaintiff in retrying before a jury the facts of a case determined by a court sitting in equity." 814 F.2d at 991.

Concomitant with the idea of judicial economy is the need for finality in discrimination claims in general. If this Court does not affirm the decision of the court below, and adopt the rule denying relitigation,

> . . . *then each time a legal claim is dismissed,* [*the court of appeals*] *would hear an interlocutory appeal that would in essence involve the merits of the claim,* even though a record had not been developed before a fact finder. *In the alternative, the litigants would conduct a trial to the bench, with the full knowledge that all could go for naught if any of the legal claims were reversed and a jury were entitled to determine the facts on a clean slate.* In this latter instance, the incentives of the litigants to litigate effectively would be diminished; moreover, needless time and expense would be undertaken. Thus the better rule, as enunciated in *Parklane,* is for the judge-determined issues to stand as the facts of the case. One trial of common facts is enough.

814 F.2d at 991 (emphasis supplied).

Thus, at minimum, this Court should adopt a rule that a district court may deny relitigation by jury whenever the evidence produced at trial does not make out a *prima facie* case, and the plaintiff could not avoid a directed verdict. Under Fed. R. Civ. P. 50(a), a party may move for a directed verdict at the close of the opponent's presentation of evidence. A court must grant the motion whenever there is complete absence of proof on an issue material to the cause of action. *Brady v. Southern Railroad,* 320 U.S. 476 (1943). As noted below, and as fully established in Respondent's brief, Lytle failed to present proof on essential elements of his claim. In these circumstances, to hold that the case must be retried before a jury would be particularly ludicrous, because the court would be obliged to direct a verdict in defendant's favor in any event.

II. *PATTERSON v. McLEAN CREDIT* MAKES CLEAR THAT SECTION 1981 DOES NOT COVER CLAIMS OF DISCHARGE OR RETALIATION, SINCE SUCH ACTIONS DO NOT INVOLVE THE "MAKING" OR "ENFORCING" OF A CONTRACT

A. *Patterson* And Its Reasoned Progeny Deny Section 1981 Coverage To Discharge And Retaliation Cases

Section 1981 protects the right of all persons, regardless of race, "to make and enforce contracts." 42 U.S.C. § 1981.[7] This Court in *Patterson v. McLean Credit Union* recently clarified the scope of section 1981. The Court confirmed that section 1981 is not "a general proscription of racial discrimination in all aspects of contract relations." 109 S.Ct. at 2372. Instead, the law protects only two rights: (1) the right to make contracts, and (2) the right to enforce contracts. *Id.* The Court went on to clarify what the right to "make" a contract means. According to this Court, the right to make contracts "extends only to the *formation* of a contract, but not to problems that may arise later from the conditions of continuing employment." *Id.* (emphasis supplied). As noted in *Patterson*:

> The statute prohibits, when based on race, the refusal to enter into a contract with someone, as well as the offer to make a contract only on discriminatory terms. *But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract* or imposition of discriminatory work-

[7] Section 1981 of 42 U.S.C. provides in full:

> *All persons* within the jurisdiction of the United States *shall have the same right* in every State and Territory *to make and enforce contracts,* to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens,* and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (Emphasis supplied).

> ing conditions. Such *postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment*, matters more naturally governed by state contract law and Title VII.

Id. at 2372-73 (emphasis supplied).[8]

In this case, Lytle alleges that Schwitzer U.S., Inc. violated Section 1981 when the company terminated him for excessive, unexcused absences, and retaliated against him by not providing detailed letters of reference to potential employers. True, *Patterson* did not specifically address terminations and retaliations, but this Court's rationale applies with full force nonetheless.[9] Such actions are simply "postformation conduct," and thus remain unprotected by Section 1981. Indeed, a discharge is the antithesis of "making" a contract—it is the termination of a contract.

This interpretation is consistent with other decisions construing *Patterson* in discharge claims. Although few Courts of Appeals have issued decisions so far, the Ninth Circuit in *Overby v. Chevron USA*, 884 F.2d 470, 50 FEP Cases 1211 (9th Cir. 1989), recently held that a

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[8] The Court further explained in *Patterson* that the right to enforce contracts "embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race." *Id.* at 2373. Section 1981 protects against "efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations." *Id.* Petitioners do not, however, argue that the Respondent impeded Lytle's enforcement of a contract. Even if Petitioners *had* made this argument, it is clear that Schwitzer U.S., Inc., in no way impeded Lytle's access to legal process.

[9] In *Leong v. Hilton Hotels Corp.* 50 FEP Cases 738, 740 (D. Hawaii 1989). the court rejected the plaintiff's argument that the resolution of discharge cases remain unaffected by *Patterson* because the Supreme Court did not specifically consider the validity of discharge claims under Section 1981.

retaliatory discharge was not actionable under Section 1981. The Court in *Overby* stated:

> Overby does not claim that Chevron prevented him from entering into a contract. To the contrary, Overby and Chevron formed a contract on February 21, 1978. Rather, he complains of postformation conduct: retaliatory discharge. Overby's right under section 1981 "to make" a contract is therefore not implicated. . . .

Id, citing *Patterson*, 109 S. Ct. at 2372-73. *Overby* went on to note that retaliatory discharge, the allegation levied against Chevron, is specifically proscribed by Title VII, and that it would "twist the interpretation" of Section 1981 to cover discharges. 50 FEP Cases at 1213.

Like the Ninth Circuit, the Sixth Circuit has come to a similar conclusion regarding discharge cases. In a case involving dismissal and demotion, the Sixth Circuit noted that "section 1981 does not encompass conduct that follows contract formation or that does not interfere with one's right to enforce established contractual duties." *Crawford v. Broadview Savings and Loan Co.*, No. 88-3694 at n.11, 1989 U.S. App. LEXIS 9921 (6th Cir. 1989).

While the district court cases involving discharges are split, most appear to agree with the *Overby* and *Crawford* rationales. For example, the court in *Leong v. Hilton Hotels Corp.*, 50 FEP Cases at 741, ruled that a racially motivated constructive discharge is not actionable under Section 1981. Significantly, the court noted that Kashiba, the plaintiff in *Leong*, experienced a "more subtle" type of harassment than did Brenda Patterson, and that Kashiba received "favorable reviews and periodic raises," while Brenda Patterson's income was affected by McLean Credit's actions. *Id.* at 740. Even so, the court in *Leong*, 50 FEP Cases at 741 ruled:

> *Clearly Brenda Patterson could have stated a constructive discharge action, more easily than Kishaba did*, had she had not been fired outright. But re-

> gardless of the label which a putative plaintiff places on the end result of discriminatory working conditions, the central, and express, holding of *Patterson* is that postformation *conduct* is not actionable under § 1981. *If postformation conduct is not actionable, then the result of such conduct, constructive discharge or simply an extraordinarily stressed or depressed employee, is irrelevant to the Supreme Court's rationale.* (Emphasis supplied).

In addition, the court in *Copperidge v. Terminal Freight Handling*, 50 FEP Cases 812 (W.D. Tenn. 1989), ruled that alleged discrimination in discharge was not covered by Section 1981 in that the "defendant's alleged discrimination did not occur at the formation of the contract, nor has it occurred when the plaintiff attempted to enforce her contract." *Id.* at 813. Similarly, in *Alexander v. New York Medical College*, No. 89 Civ. 1092, 1989 U.S. LEXIS 11433 (S.D.N.Y. Sept. 29, 1989), the court dismissed a plaintiff's discharge allegations, noting that "courts uniformly have rejected attempts to redress discriminatory discharges" after *Patterson*. Like other courts, *Alexander* reasoned that the "language of § 1981 does not invite [the] construction" that a discharge is a failure to make a contract.[10]

Significantly, courts have begun to grant motions to dismiss discharge cases involving Section 1981 at the summary judgment stage. For example, the court in *Rivera v. AT&T Information Systems, Inc.*, No. 89-B-109, 1989 U.S. Dist. LEXIS 10812 (D. Col. Sept. 13, 1989), held that the company was entitled to judgment

[10] *See also Carroll v. General Motors Corp.*, CA No. 88-2532-0, 1989 U.S. Dist. LEXIS 10481 (D. Kansas 1989); *Carter v. Aselton*, 50 FEP 251 (M.D. Fla. 1989) (same); *Greggs v. Hillman Distributing Co.*, 50 FEP 429 (S.D. Tex. 1989); *Jones v. Alltech Associates, Inc.*, No. 85 C 10345, 1989 U.S. Dist. LEXIS 10422 (N.D. Ill. 1989); *Kolb v. Ohio*, No. 87 Civ. 1314 (N.D. Ohio 1989); *Williams v. National Railroad Passenger Corp.*, 50 FEP 721 (D.D.C. 1989); and *Wilmer v. Tennessee Eastman Co.*, CA No. H-85-6742 (S.D. Tex. 1989).

as a matter of law because, "under the plain language of Section 1981, discriminatory discharge, like racial harassment amounting to breach of contract, is post contract formation conduct." *See also Riley v. Illinois Dept. of Mental Health and Development Disabilities*, No. 87 C 10436, 1989 U.S. Dist. LEXIS 7686 (N.D. Ill. 1989); *Mathis v. Boeing Military Airplane Co.*, No. 86-6002-K, 1989 U.S. Dist. LEXIS 8849 (D. Kansas 1989); *Boston v. AT&T Information Systems*, No. 88-141-B (S.D. Iowa 1989); and *Tadros v. Coleman*, No. 88 Civ. 4431, 1989 U.S. Dist. LEXIS 6895 (S.D.N.Y. 1989). Some courts have even begun to order dismissals of discharge cases *sua sponte*. *See Soffrin v. American Airlines*, 50 FEP 1245 (N.D. Ill. 1989).

Admittedly, some courts have ruled to the contrary—that Section 1981 discharge suits should not be dismissed in the same manner as harassment suits.[11] In so holding,

[11] *See, e.g., Padilla v. United Air Lines*, No. 88-A-400, 1989 U.S. Dist. LEXIS 8934 (D. Colo. 1989). At least one court has strongly criticized *Padilla* and the cases that follow its line of logic:

> *After careful consideration of the Supreme Court's opinion in Patterson, this Court has determined that it must respectfully disagree with the Colorado court* [in *Padilla*]. If there were any indication that the right to make a contract under § 1981 should be construed broadly as the right to enjoy the benefits of that contract, the Colorado court would no doubt be correct in its reasoning. But the Court in *Patterson* did not interpret the right to make a contract under § 1981 in this manner. Justice Kennedy's repeated emphasis on the distinction between conduct which occurs before a contract is formed and conduct which occurs after it is formed reflects an extremely narrow interpretation of the right to make a contract guaranteed by § 1981, one which encompasses only the right to enter into a contract. Thus, *under Patterson, once an individual has secured employment, the statute's protection of the right to make a contract is at an end.* With respect to conduct which occurs after that point—including discharge—the individual must look to the more expansive provisions of Title VII. (Emphasis supplied).

Hall v. County of Cook, State of Illinois, No. 87 C 6918, 1989 U.S. Dist. LEXIS 9661 (N.D. Ill. 1989) (emphasis supplied). *See also*

several of these courts—most notably two decisions of the Northern District of Indiana—cite this Court's *dicta* in *Jett v. Dallas v. Independent School District*, 109 S. Ct. 2702 (1989).[12] In *Jett*, a black school principal recommended that Jett, a white football coach, be removed from his job and reassigned to a teaching position that had no coaching responsibilities.

The Court in *Jett* noted that, unlike the employer in *Patterson*, "at no stage in the proceedings has the school district raised the contention that the substantive scope of the 'right . . . to make . . . contracts' protected by § 1981 does not reach the injury suffered by [the plaintiff] here." 109 S. Ct. at 2709. Because the school district "never contested the judgment below on the ground that § 1981 does not reach [plaintiff's] injury, we assume for purposes of these cases, without deciding, that petitioner's rights under § 1981 have been violated by his removal and reassignment." *Id.* at 2710. Clearly, this Court did not back away from its holding in *Patterson* that postformation conduct (other than the creation of a "new" contract) was not actionable under Section 1981. Second, it noted that the scope of § 1981 had not even been raised in *Jett*. This Court only *assumed* in *Jett* that Section 1981 covered the defendant's conduct so that the Court could reach the remaining issues in the case.

While there is some debate among the district courts with regard to discharge, there has been no debate with regard to retaliation cases, particularly those that do

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Concurring opinion of Judge Cudahy in *Malhotra v. Cotter & Co.*, No. 88-2880 (7th Cir. Sept. 12, 1989) (retaliatory discharge claims may be adjudicated under Section 1981). It is clear, however, that this case does not involve allegations of retaliatory discharge.

[12] *See, e.g., Malone v. U.S. Steel Corp.*, Civ. No. H 83-727 (N.D. Ind. July 19, 1989); *Robinson v. Pepsi-Cola Co.*, Civ. No. H 87-375 (N.D. Ind. July 7, 1989).

not involve retaliatory firings.[13] Section 1981 is simply not applicable to retaliation claims since they involve postformation conduct. For example, in *Alexander v. New York Medical College*, *supra*, the court cited a number of other jurisdictions that have dismissed Section 1981 claims alleging a variety of postformation wrongs, and thus dismissed a plaintiff's allegation that her employer retaliated against her for filing a discrimination claim.[14]

B. Strong Policy Reasons Support The Exclusion Of Discharge And Retaliation Claims From The Scope Of Section 1981

Not only is the exclusion of discharge and retaliation claims supported by *Patterson* and its reasoned progeny, but it is supported by strong policy reasons as well. First, and foremost, it would debase the procedures established under Lytle's alternative remedial statute, Title VII. As this Court in *Patterson* stated:

> *Interpreting § 1981 to cover postformation conduct . . . would also undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims.* In Title VII, Congress set up an elaborate administrative procedure, implemented through the EEOC, that is designed to assist in the investigation of claims of racial discrimination in

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[13] The courts in *Jordan v. U.S. West Direct Co.*, 50 FEP 633 (D. Colo. 1989), and *English v. General Dev. Corp.*, 717 F.Supp. 628 (N.D. Ill. 1989) would protect retaliatory discharges under Section 1981. The court in *Alexander*, however, "respectfully disagrees" with their holdings, LEXIS Op. at 2, noting that a retaliatory discharge "in no way obstructs access to judicial redress, as is evidenced by Ms. Alexander's presence before this Court." *Id.* at n.5.

[14] Similarly, the district court in *Dangerfield v. Mission Press*, 50 FEP Cases 1171 (N.D. Ill. 1989), ruled that plaintiffs could not maintain a claim that their employer retaliated against them for filing an EEOC charge since the defendant in no way interfered with their access to legal enforcement of their claims. Likewise, in *Williams v. National Railroad Passenger Corp.*, 50 FEP Cases 721 (D.D.C. 1989), the court refused to sanction a claim involving retaliatory downgrade for filing a Section 1981 claim.

> the workplace and to work towards the resolution of these claims through conciliation rather than litigation. . . Only after these procedures have been exhausted, and the plaintiff has obtained a "right to sue" letter from the EEOC, may she bring a Title VII action in court. . . Section 1981, by contrast, provides no administrative review or opportunity for conciliation.

109 S. Ct. at 2374-75 (emphasis supplied and citations omitted). As this Court noted, "Where conduct is covered by both § 1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter, as the plaintiff is free to pursue a claim by bringing suit under § 1981 without resort to those statutory prerequisites." While there must be some overlap between Title VII and § 1981, courts "should be reluctant, however, to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." *Id.* at 2375.[15]

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[15] In this regard, the Ninth Circuit in *Overby* recently stated:

> Though an argument could be concocted that such conduct impedes, in some broad sense, Overby's access to the EEOC, the Court in *Patterson* counseled against stretching the meaning of section 1981 to protect conduct already covered by Title VII. . . . The Court reasoned that Title VII contains a comprehensive and detailed scheme, including well-crafted conciliatory procedures, for resolving disputes regarding employment discrimination . . . . Reading section 1981 too broadly would permit plaintiffs to circumvent Title VII's detailed statutory prerequisites to bringing an action in federal court, thereby frustrating Title VII's conciliatory goals and disrupting the delicate balance struck between employers and employees' rights . . . . This concern is particularly apt where, as here, the very conduct complained of centers around one of Title VII's conciliatory procedures: the filing of an EEOC complaint. Because section 704(a) of Title VII proscribes Chevron's alleged conduct, we therefore decline "to twist the interpretation of another statute (§ 1981) to cover the same conduct." . . . We hold that the district court properly granted summary judgment in favor of Chevron on Overby's Section 1981 claim.

50 FEP at 1213.

In denying Section 1981 coverage to the instant claim, other policy rationales are evident. As this Court stated in *Patterson*:

> *That egregious racial harassment of employees is forbidden by a clearly applicable law (Title VII), moreover, should lessen the temptation for this Court to twist the interpretation of another statute* (§ 1981) to cover the same conduct. . . the availability of the latter statute should deter us from a tortuous construction of the former statute to cover this type of claim.

109 S.Ct. at 2375. This Court should not construe Section 1981's language to include terminations or retaliations that in no way impair a plaintiff's access to the courts.[16]

Indeed, by reading § 1981 not as a "general proscription of racial discrimination" covering discharges and retaliation, but as "limited to the enumerated rights within its express protection, specifically the right to make and enforce contracts," this Court will go a long way to "preserve the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws." 109 S. Ct. at 2375.

C. Courts Already Interpret And Enforce Title VII In A Manner That Protects The Rights Of Charging Parties And Is Consistent With Federal Anti-discriminatory Policy

As this Court has recognized repeatedly, Title VII's legislative history demonstrates that its detailed administrative and judicial enforcement machinery was carefully designed to balance the competing interests involved in an employment discrimination complaint. *See, e.g., Occidental Life Insurance Co. of California v. EEOC,*

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[16] Unfortunately there is already evidence that plaintiffs have begun to "artfully plead" their discharge cases to look like "making of a contract" cases. *See, e.g., Rick Nolan's Auto Body Shop, Inc. v. Allstate Insurance Co.*, No. 88 C 7147, 1989 U.S. Dist. LEXIS 10357 (N.D. Ill. 1989).

432 U.S. 355, 359, 372-73 (1977). Delegation of enforcement authority to the Commission shifts the burden of prosecution from the individual complainant, assures employees that the agency issuing discrimination guidelines will also be the agency enforcing compliance, and encourages the settlement of disputes through informal conciliation rather than formal judicial proceedings.[17]

In addition, potential substantive conflicts between Title VII and § 1981 have been resolved in favor of those standards adopted by Congress in Title VII—even when specific exempting language of Title VII has not been found in § 1981.[18] Thus, it cannot be said that § 1981 provides more protection than Title VII in defining what discriminatory conduct is prohibited under federal law. Indeed, it is Title VII that provides more protections, because, unlike § 1981, the EEOC and Title VII plaintiffs may proceed under the adverse impact theory and are not limited to the disparate treatment model. *General Building Contractors Ass'n. Inc. v. Pennsylvania*, 458 U.S. 375 (1982); *Washington v. Davis*, 426 U.S. 229 (1976).

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[17] *See* Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1200, 1270 (1971). Ultimate resort to the federal courts also delegates the tasks of investigation and fact-finding to the agency that has the specialized knowledge and resources to do so, while insuring that the private claimant will receive the most complete relief possible. Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824, 881 (1972).

[18] *See, e.g., Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1316, 1320 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976) (seniority system that is valid under Title VII cannot be attacked under § 1981); *United States v. Trucking Management, Inc.*, 662 F.2d 36 (D.C. Cir. 1981); *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); and *United States v. East Texas Motor Freight System Inc.*, 564 F.2d 179, 185 (5th Cir. 1977) (same re Executive Order 11246).

Charging parties, moreover, have little cause to complain about the way in which Title VII's procedural requirements have been interpreted since the Act was amended in 1972, at which time the EEOC's authority was expanded. Indeed, many of the concerns that Title VII's technical requirements would adversely affect individual rights have proven to be unfounded. For example, Title VII's charge-filing requirement is *not* a jurisdictional prerequisite and, like § 1981's period, is subject to waiver, estoppel and equitable tolling.[19] Also, the limitations period gap between the two statutes has been narrowed substantially.[20] Moreover, charging parties may receive an award of attorney's fees under Title VII for work done in connection with administrative proceedings following reference to a state agency.[21]

EEOC investigations, of course, can be an extremely effective enforcement method. To illustrate, the EEOC's investigatory and subpoena enforcement authority has been applied much more broadly than would be available to the individual § 1981 plaintiff.[22] And should the EEOC decide not to sue, for whatever reason, the information developed in its investigation is available to the charging party and his attorneys once a private Title VII court suit is filed. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981). This information can thus be used as the basis for the plaintiff's private lawsuit.

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[19] *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

[20] *EEOC v. Commercial Office Products Co.*, 108 C. Ct. 1666 (1988), virtually eliminated the 180-day filing period for Title VII. The Court held that the extended 300-day period applies in a deferral state even though an individual has not filed a timely 180-day charge with the state agency as required under state law. By contrast, *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617 (1987), requires that § 1981 suits are governed by the state personal injury statute of limitations period, which typically is much shorter than the contract suit limitations period sought by § 1981 plaintiffs.

[21] *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980).

[22] *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).

This Court also should be aware of several relatively recent initiatives adopted by the EEOC to increase substantially the advantages to charging parties of proceeding under Title VII. First, effective August 1, 1987, the EEOC implemented a final rule permitting charging parties to appeal "no-cause" determinations issued by the agency's district directors. See 29 C.F.R. Part 1601.19. This procedure was adopted to assure that agency investigations were impartial, thorough, legally sound, professional, and conducted in a manner that would minimize the need for charging parties to sue without EEOC assistance.

Also, on February 5, 1985, the EEOC adopted a *Policy Statement on Remedies and Relief for Individual Victims of Discrimination*, 8 Fair Empl. Prac. (BNA), 401:2615-401:2618. This policy was adopted in response to concerns that cases may be settled with less than full relief for discrimination victims. The policy provides for the following: full (not partial) back pay; enhanced reinstatement or placement rights; new notice posting requirements to inform other employees of discrimination problems; and potential direct disciplinary action against offending supervisory personnel.[23]

Moreover, when the EEOC decides to sue an employer, it may do so unencumbered by the class action limitations of Rule 23 of the Federal Rules of Civil Procedure. *General Telephone Company of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980). As this Court noted in *General Telephone*, by expanding the EEOC's enforcement powers in 1972, "Congress sought to implement the public interest as well as to bring about more effective enforcement of private rights. . . . The EEOC was to bear the primary burden of litigation, but the private action previously available under § 706 [of Title VII] was not superseded." *Id.* at 325-36.

[23] In conjunction with its enhanced remedial policy, the EEOC also has adopted tougher policies and procedures for dealing with recalcitrant employers and in seeking subpoenas. *See* 29 C.F.R. 1601.16(b)(1) and (2) [subpoenas]; and EEOC; Investigative Compliance Policy, 8 Fair Empl. Prac. (BNA) 40:2625-40:2626. Under these policies, when an employer fails to comply with requests for information in a timely or complete manner, EEOC district directors are instructed to take one or more actions including: immediate issuance of a subpoena; proceeding more directly to litigation; and drawing an adverse inference against a respondent as to the evidence sought when records are destroyed or not maintained.

Further, "EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." *Id.* at 331. EEOC also may proceed unencumbered by Rule 23's requirement that an individual's claim be typical of other class members.[24] And when the district court finds that discrimination has occurred, it "has not merely the power but the duty to render a decree which will *so far as possible* eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Albemarle Paper Company v. Moody*, 422 U.S. 405, 418 (1975) (emphasis supplied).

Accordingly, EEOC-brought Title VII actions benefit the public interest, in addition to purely private concerns, in many ways that § 1981 suits do not. Individual plaintiffs, quite frankly, often are motivated primarily by an attempt to extract the maximum possible monetary award or settlement, unencumbered by administrative requirements intended to eliminate discrimination on a broader scale by the involvement of an expert agency designed to give assistance to *all* victims of discrimination.

[24] *Id.*; *Compare, General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) (applicant cannot be class representative for incumbent employees).

CONCLUSION

For the foregoing reasons, this Court should dismiss the petition for a writ of certiorari as improvidently granted in lieu of Section 1981's inapplicability to discharge and retaliation claims or, in the alternative, this Court should affirm the decision of the Court of Appeals below.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
GAREN E. DODGE *
MCGUINESS & WILLIAMS
Suite 1200
1015 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae,
Equal Employment
Advisory Council

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* Counsel of Record